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IN THE

SUPREME COURT OF THE UNITED STATES

October Term

No. 44.

COURIER-JOURNAL & LOUISVILLE TIMES P

vs.

L. B. CURTIS, Judge Jefferson Circuit Court, Criminal Branch Second Division, Jefferson County, Kentucky, and JAMES M. YODER, Clerk Circuit Court Stenographer Jefferson Circuit Court Criminal Branch Second Div. Jefferson County, Kentucky

Respondents.

BRIEF FOR RESPONDENTS.

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IN THE

Supreme Court of the United States

October Term, 1960

No. 442

COURIER-JOURNAL & LOUISVILLE TIMES, *Petitioner,*

v.

L. R. CURTIS, Judge Jefferson Circuit Court, Criminal Branch, Second Division, Jefferson County, Kentucky, and JAMES M. YODER, Official Court Stenographer, Jefferson Circuit Court, Criminal Branch, Second Division, Jefferson County, Kentucky, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

BRIEF FOR RESPONDENTS

COUNTER STATEMENT OF QUESTION PRESENTED

The Petitioner states that the question presented is whether the sole evidence upon which a State Court set aside a conviction and death sentence for two heinous and brutal murders may be kept secret by that State Court in violation of the public right in public trials and the freedom of the press guaranteed

by the Fourteenth Amendment. This does not correctly state the question.

There had been no death sentence. The accused filed a motion for a new trial after a verdict of guilty in which the jury fixed the punishment at death on one of the charges. There was no evidence heard on the motion to set aside the verdict and no secret hearing on that motion. After the accused announced in open Court he would change his plea from not guilty to guilty, he requested permission of the Judge to make a statement or ask a question in confidence before entering his plea (App. *, p. 15).* This was done in the presence of counsel for the Commonwealth and for the accused.

The only question involved is whether the Judge having heard, in confidence and in the presence of counsel, a statement or question, which was not a part of the trial, was obliged to have a transcript made of this confidential statement for the benefit of the Petitioner.

*The record has not been printed. The references are to the appendices attached to the Petition.

COUNTER-STATEMENT OF THE CASE.

The crimes were committed on December 31, 1957. At the trial for one of the crimes in May, 1958, there was a verdict of guilty and the jury fixed the sentence at death. Before any judgment was entered, the accused made a timely motion for a new trial which was passed from time to time by consent of counsel until January 12, 1959.

At that time, in open Court, the Judge was informed that there had been conferences between the Commonwealth's attorney and counsel for the accused, and that the accused wished to change his plea from not guilty to guilty.

The accused, an individual of sub-normal mentality (Petition, p. 6), asked permission to make a statement or ask a question of the Judge confidentially before entering his plea. Thereupon, the Judge and counsel for both parties retired to the Judge's chambers. The accused objected to the presence of newspaper reporters at the time he made his statement and they withdrew.

Following this, in open Court, the accused pleaded guilty to the charge of murder in both cases, and on the recommendation of the Commonwealth's attorney, the jury fixed the penalty at life imprisonment.

The Judge considered that he should listen to the accused, who had first pleaded not guilty and now wished to change his plea, in order to make certain

that the accused understood what his plea would mean (App. B, p. 15).

The record does not disclose what was said in chambers. In fact, it was not a part of the record because on a plea of guilty in open Court, when accepted, there was nothing left to be done except to permit the jury to fix the penalty.

Two days later, on January 14, 1959; the Petitioner filed in the Court of Appeals of Kentucky its Petition for Writ of Mandamus against the Respondents without joining the accused and asked for an immediate hearing

> "because the news value and interest of the Petitioner and the general public is immediate and will be completely and totally destroyed by any delay or protracted extension of these proceedings" (App. B, p. 5).

On Thursday, January 15, 1959; the Respondents were notified that the Court of Appeals would hear arguments on Tuesday, January 20, 1959. There was no time to take testimony, and the record only discloses the conflicting allegations in the pleadings and affidavits as to what took place.

The Petitioner argued that a confession had been made to the Judge in chambers and that such confession was "apparently relied upon by the Court in granting the motion for a new trial" (App. A, p. 2), but the Petition for writ of Mandamus does not so allege (App. B, pp. 2-5).

The Respondents denied that the accused had made a confession in chambers and alleged that the Judge permitted the accused to make a statement in chambers because the Judge wished to be sure the accused, who had theretofore pleaded not guilty, understood what his plea of guilty would mean (App. B, pp. 13-15). It is admitted that the plea of guilty was made in open Court (App. B, p. 3).

The Petitioner demanded an immediate hearing because the news value would be completely destroyed by delay (App. B, p. 5) with the result that no evidence was taken. There is no evidence, but only the contention of the parties as to what took place.

REASONS FOR DENYING THE WRIT.

This is not a case in which important constitutional questions can well be decided. The record is cloudy on the facts. Because the Petitioner demanded an immediate argument in the Court of Appeals there was no time for taking testimony (*Maryland* v. *Baltimore Radio Show*, 338 U. S. 912, 918).

The Judge was in position to know the facts. He felt he was not privileged to violate the confidence placed in him in a matter which in his judgment did not constitute a part of the record. The accused objected to his confidential statement being made available to the press (App. B, pp. 7-8).

The Petitioner admits that it already knows the substance of what took place in chambers. It says the "contents were known to Petitioner's representa-

tives and divulged to them by other parties" (App. C, p. 37). It wants the facts spread on the record so that it will not incur any risk of damages for libel in making the publication. It says:

> "The prospect of libel actions is an important consideration for those engaged in the newspaper business * * *. The only way this Petitioner could protect itself against any libel actions growing out of the publication of the contents of the confession which was made in the Court's chambers (which contents were known to Petitioner's representatives and divulged to them by other parties) would be to actually obtain the confession since other persons were supposedly named in that confession" (App. C, p. 37).

The Petitioner contends that the Judge must violate the confidence solely for the purpose of protecting it against a libel action which has not been filed although the statutes provide that a newspaper cannot be required to disclose in any proceeding the source of any information procured by it (KRS 421.100). It says that confidential information given to a Judge is not privileged although confidential information given to a newspaper is privileged.

The Respondents have no interest of their own to serve. The only rights involved here are the rights of the accused, who was not a party to the Mandamus proceedings. The Judge considered he was honor-bound to treat as confidential that which had been told him in confidence since in his opinion, the statement was not a confession and was not a part of the record.

It will not do to refer to the Judge's conduct as "this arbitrarily imposed huggermuggery" (App. C, p. 4). In doing only that which a judge considers to be his duty, he is at great disadvantage in being made a litigant.*

The alleged fact that the crimes for which the accused was being tried were "two of the most heinous crimes ever committed in the State of Kentucky" should not prevent the Judge from being just as fair to such a defendant as to any other defendant. A judge should not deny rights to a defendant charged with a heinous crime. A judge is not a mere referee. If he has no discretion, then he has no responsibility. The sanctity of the Court is important.

The Judge had the discretion to decide whether the confidential statement made to him was a part of the record. As pointed out in the concurring opinion of Judge Milliken of the Court of Appeals of Kentucky (App. B, pp. 23-24), such an eminent authority as Mr. Wigmore in his work on Evidence (Vol. 8, § 2376) said:

> "But is there not a distinct principle, by which communications in the nature of confessions, or similar confidences, made privately and not in open court, by parties who are implicated in a wrong or crime and desire guidance for their course of action, are privileged from disclosure by him, at his option? No obstruction to the course of justice

*Counsel for the Respondents were not counsel for the accused and appear herein for the Respondents at the request of the Louisville Bar Association.

can be apprehended by allowing such confidences to be preserved. The necessity and propriety, for the administration of justice, of assuring official confidence to informants desiring to unburden themselves is even plainer when a judge is the repository of that confidence, than in the case of prosecuting officials. The judge is indeed the most appropriate person to represent the Law's confessor."

If the Judge has no discretion then the constitutional right contended for here would sustain the right of a television station to make a television transcript of the trial (*Atlanta Newspapers, Inc.* v. *Grimes*, —— Ga. ——, 114 S. E. 2d 421). If the Constitution guarantees the right to report all proceedings in connection with a lawsuit, what about a psychiatrist's examination of a defendant or the proceedings before a Grand Jury, or the conferences between the Commonwealth's attorney and the counsel for the accused?

The authorities relied upon are not in point. This case does not involve the right of the accused to a public trial.

In re Oliver, 333 U. S. 257, involved the sending of a man to jail for contempt of a "one man grand jury" as authorized by Michigan law. He was given no chance to enjoy the benefits of counsel, no chance to prepare a defense, no opportunity to cross-examine or to refute the charges aaginst him. Clearly, this was a violation of the Fourteenth Amendment as the court held. However, it did not involve the right of a newspaper in anyway to require the Judge to break con-

fidence with defendant and counsel as is the issue here. Thus, the case is not in point.

Craig v. *Harney*, 331 U. S. 367, clearly is not in point for no one has been held in contempt of any court order. There a newspaper was held in contempt for publishing articles about a trial. The case held that this is fair comment and could not be restrained by the Court. Here the Court has made no effort to restrain the newspaper's articles about the trial. The newspaper has commented to its heart's content. Thus, the issue is simply not the same.

Maryland v. *Baltimore Radio Show*, 338 U. S. 912, is an opinion upon the effect of a denial of certiorari. Here again fines were imposed, because the respondents were held guilty of contempt for broadcasting over certain radio stations matter relating to one Jones who was then in custody charged with murder. The Maryland Supreme Court reversed the findings because the judgments of contempt violated the First and Fourteenth Amendments as to freedom of speech and freedom of the press. The United States Supreme Court denied certiorari upon the petition of the State of Maryland. Justice Frankfurter's opinion deals mainly with the fact that denial of certiorari does not really determine a holding of the Supreme Court as it may be denied for various reasons not pertaining to the merits. Thus, the case does not deal with the issue at hand as it is not the issue one way or the other. Here the Trial Court has not attempted to stop in any manner anything the newspapers are saying or want to say about the matter.

Grosjean v. American Press Co., 297 U. S. 233, deals with special taxes levied on newspaper advertising revenue based on circulation. Certainly, that question is not involved for here there is no effort to muzzle the press or put it out of business by excessive taxation.

If the Fourteenth Amendment deprives a trial Judge of all discretion as to whether he can maintain a confidence under the circumstances of this case, then it also deprives the Legislature of any discretion to determine whether other public records, such as tax returns may be kept confidential.

The Respondents and their counsel admit that the Petitioner publishes a great newspaper and performs a great public service, but newspapers, like lawyers, can become over zealous. Freedom of the press carries with it a corresponding responsibility. Respect for the Courts and granting to them some latitude of discretion in the performance of their duties is just as important as is the protection of a newspaper from liability for libel.

CONCLUSION.

The Petition for a Writ of Certiorari should be denied.

ROBERT P. HOBSON,
Kentucky Home Life Building,
Louisville 2, Kentucky.

LEO T. WOLFORD,
501 So. 2nd Street,
Louisville 2, Kentucky,
Counsel for the Respondents.